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# Corporate M&A

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**Switzerland: Trends & Developments**

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# Trends and Developments

*Contributed by Bär & Karrer AG*

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## Author

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### A Busy Year for M&A

2018 was a very strong year for M&A in Switzerland. With almost 500 transactions, whereof more than 150 involved private equity investors, the number of transactions surpassed even the record year of 2014. Overall transaction value was USD120 billion, marking a slight increase on 2017, but due to the lack of mega deals did not reach the record level of 2014. The number of outbound transactions was almost twice as high as the number of inbound transactions and in terms of transaction volume, Asia was the main source for acquisitions of Swiss companies.

### Activists Playing a Key Role with Limited Instruments

Compared to 2017, shareholder activist campaigns were hardly conducted in 2018. However, shareholder activists are still a significant force in Switzerland: in some mid-sized listed companies, they requested that representatives be elected as members of the board of directors and/or that certain rules in the articles of association be amended to the effect that the exercise of shareholder rights be facilitated (such as a lower threshold for the request that an agenda item be included in the invitation).

The instruments available to shareholder activists in Switzerland are rather limited. They can request from the board of directors that some agenda items are included in the invitation to a shareholders' meeting or, if the shareholder owns a stake of at least 10%, that an extraordinary shareholders' meeting be held. These rights are, however, limited to requesting votes on issues that can be decided by the shareholders. As the powers of a shareholders' meeting are limited, in most cases requests of activists are focused on the board composition, or, as in the case of Clariant, activists simply build a large stake and try to exert pressure on the board of directors by other means. Given that such other means are limited in Switzerland, short-term-oriented activists are often seen in special situations only. Long-term-oriented activists are forced to be represented on the board of directors due to the limited legal instruments available to activists in Switzerland.

### Shareholders Keen to Retain a Stake in the Future

Another trend seen lately is that existing shareholders do not want to exit in the context of a going private transaction, but rather to remain invested in some way. The takeover of the SIX-listed Actelion by the NYSE-listed Johnson & Johnson, for example, involved the creation of Idorsia, a spin-off keeping Actelion's drug discovery and early clinical pipeline that was listed on SIX in June 2017. The founder and CEO of Actelion, Jean-Paul Clozel, is the CEO of Idorsia and together with his wife holds over 25% of Idorsia. Another example where former shareholders remained invested was

the public takeover of ImmoMentum, a real estate company that was listed on the BX Berne eXchange. Four shareholders, who together held 15.22% of ImmoMentum, contributed a certain number of their ImmoMentum shares to the offeror at the offer price and in turn received shares of the offeror. Finally, this trend also seems to have been established in private M&A transactions. When, in April 2017, the Kuoni Group, which since a public takeover in 2016 has been controlled by EQT, sold the B2B bed bank GTA to the Spanish Hotelbeds group, it announced that the Kuoni and Hugentobler Foundation would keep a stake in the combined Hotelbeds/GTA business.

Going private transactions in which one or several main shareholders become shareholders of the offeror – and remain invested – are quite demanding to implement because of the equal treatment obligation of the offeror and in particular the limits set by the (minimum) price rules. The overall benefits and costs associated with becoming a shareholder of the offeror based on an existing position as a shareholder of the target company must be such that the price rules and the equal treatment obligation are met. Such an assessment entails extensive valuation exercises of shareholder positions and rights governed in shareholder agreements normally performed by boutique firms focused on valuations. In theory, the equal treatment rule might even lead the respective main shareholder to receive less than tendering shareholders who exit in the course of the going private if the ancillary benefits stemming from the new shareholding in the offeror exceed the costs associated with this new position.

**Anchor Shareholders Providing Stability**

In 2018 another trend seemed to persist: companies evaluating ownership structures that include an anchor shareholder. Such a structure can be implemented by various means, in particular a partial public tender offer, a capital increase, a commitment to purchasing shares in an IPO, an acquisition of a business with a consideration in shares (capital increase based on a contribution in kind), or an activist selling its participation to a long-term-oriented shareholder. A company assumes that with an anchor shareholder, a strategy focused on long-term shareholder value creation can be pursued without disruption by other shareholders and/or opportunistic acting activists or competitors. At the same time, companies often aim to enter into a relationship agreement (often also labelled as a corporate governance agreement) with the anchor shareholder and attempt to channel the influence of the anchor shareholder by means of voting arrangements.

Such a relationship agreement normally governs at least the representation of the anchor shareholder on the board of directors by providing for a duty of the company to propose a number of members nominated by the anchor shareholder, but also by limiting this number. In addition, some form of a standstill is usually implemented in which the anchor shareholder agrees not to increase the participation above a certain level and/or not to launch a public tender offer unless the board is willing to recommend the offer to the shareholders.

Companies often also try to govern how the votes of the anchor shareholder are exercised. Normally, anchor shareholders only accept voting arrangements with respect to selected agenda items such as dividend payments or third-party transactions. Such voting arrangements are normally limited in time and often simply oblige the anchor shareholder to exercise the votes pursuant to the proposal of the board of directors. The extent to which such voting arrangements in a relationship agreement are legally valid under Swiss law is unclear and disputed.

A special provision for a relationship agreement was contained in the agreement between CEVA Logistics AG, which was listed on the SIX Swiss Exchange in 2018, and its anchor shareholder CMA CGM S.A. Especially when an anchor shareholder receives their stake in the context of an IPO, it can be important that a tender offer at attractive conditions can still be successful even if this stake is significant. For this reason, a special provision was included in the relationship agreement, whereby if a third party makes a public tender offer for the shares, the anchor shareholder shall have the right to submit a superior offer. If the anchor shareholder does, however, not submit a superior offer, then subject to certain exceptions it shall be obligated to tender its shares in the third party offer if such an offer is recommended by the board of the company.

**Selective Opting Out Not Only in Transactions, But Also in the Context of IPOs**

In 2018, two companies have been listed on the SIX Swiss Exchange with a selective opting-out provision in their articles of association. With a selective opting-out provision, certain shareholders can be excluded from the obligation to make a mandatory tender offer if they reach or exceed the threshold of 33 1/3% of the voting rights. While the introduction of a selective opting-out provision before the listing is not subject to any further conditions, the introduction after a company has been listed is only valid if the shareholders have been fully and properly informed and if the majority of the minority shareholders has voted in favour of the provision.

While selective opting-out provisions are frequently introduced in connection with transactions, it is a rather new phenomenon for them to be introduced in the context of an IPO.

**Question Marks Over Enforceability**

Another important, but in most respects unclear, aspect of voting arrangements is enforceability. Although it seems to

be clear that a relationship agreement leads to concerted activity for the purpose of disclosure of shareholdings, it is not entirely clear under which circumstances a relationship agreement might trigger a duty to launch a mandatory offer if the shares held by the anchor shareholder together with the treasury shares of the company are above one third of all shares. If the rights and obligations under such an agreement result in concerted activity within the meaning of the mandatory offer rules and if the combined 'holding' is in excess of one third of the recorded share capital, a solution can be that some form of an opting out – a selective partial opting out is the preferred solution – is implemented in the articles of association of the company by a respective shareholder resolution.

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Irrespective of all these uncertainties, it must be assumed that in 2019 even more companies are evaluating some kind of transaction that would result in an ownership structure with an anchor shareholder. Advising an anchor shareholder or the company is an interesting and challenging matter because precedents are rare and the standards can be elaborated.